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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—337

FRANK DORAN, Individually and as town attorney for the Town of North Hempstead,

Appellant,

v.

SALEM INN, INC., M & L REST., INC., and TIM-ROB BAR, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

Questions Presented

Appellants pose two questions on this appeal. The first is "whether the Town of North Hempstead may constitutionally prohibit 'topless dancing'?" It is respectfully submitted that this is *not* the question which was determined below and which may be properly raised herein.

The question is not whether a local government may prohibit "topless dancing", but rather whether it may do so with an across the board, speech inhibiting, blunderbuss ordinance serving no compelling governmental interest.

As to the second question posed by appellants, whether a Federal Court may be *required* to abstain in a Civil Rights case by reason of the subsequent commencement of a state criminal prosecution under the attacked ordinance, this question has, at least as to injunctive relief, been determined by this Court within the past year in *Steffel* v. *Thompson*, 415 U.S. 452 (1974). In any event, the assertion of this doctrine of *post facto jurisdictional divestiture* is quite novel, and unprecedented in law or reason. *The question, therefore, is whether the Federal Courts will abrogate their responsibility to vindicate First Amendment Rights by granting declarative and injunctive relief with respect to an overbroad local law as to both federal plaintiffs who are not involved in state prosecutions initiated under the attacked law and federal plaintiffs whose employees became involved in such prosecutions after the filing of the federal action.*

The Ordinance

The ordinance does not, as appellants claim, prohibit "topless dancing". It prohibits in *all public places* the appearance of any person with *breasts* or the *lower part of the torso* uncovered even if such appearance be part of a *"scene, sketch, act or entertainment."*

There is no public exhibition which is not engulfed by the ordinance. It covers a ballet, musical, legitimate show with or without dancing, acquatic display, swimming race, weight lifting contest, belly dance, modern dance, go-go dance, etc. It ensnares bikini wearers and plunging neckline wearers. It paints the Ballet Afrikans, musicals such

as "Hair", topless go-go dancers and nude sunbathers with the same brush. It makes the proprietor of a public place legally responsible for the attire of his patrons. It makes it a crime to uncover "the lower part of the torso" without defining precisely what area of exposure would fix liability.

The ordinance serves no legitimate or compelling state interest, since its alleged benefits could be achieved through enforcement of existing laws.

It does not, as appellants claim, merely prohibit "topless dancing." It would take dozens of state cases and years to limit its radiant scope. In the meanwhile, expression protected or presumptively protected by the First Amendment would be chilled and suppressed in the ephemeral cause of modesty, under the guise of morality and in the service of hypocrisy.

The Facts

Appellees are the owners and operators of bars in the Town of North Hempstead, Nassau County, State of New York, which provide and have for years provided, live topless dancing entertainment by professional dancers who perform on a stage in a decorous manner for the entertainment of forewarned consenting patrons (A-8, 9, 15-20).

On July 17, 1973, the Town of North Hempstead adopted Local Law No. 1—1973 (hereinafter referred to as the "Ordinance") which made unlawful the appearance of *any person* with uncovered breasts or lower part of the torso in *any public place* and in addition, made unlawful the permitting of entertainment involving the proscribed exposure in all public places. Within the scope of activities prohibited by the Law was the type of dancing entertainment provided in appellees' establishments. Because the ordinance made the entertainment offered by appellees unlawful, and because of their fear of prosecution should

they violate the ordinance, appellees ceased on the date that the ordinance became effective, to provide topless dancing entertainment for their patrons. This cessation caused appellees to sustain immediate severe economic loss, threatened them with insolvency and their employees with unemployment and deprived their patrons of the right to view the topless dance performances theretofore offered at the premises (A-15-20).

Faced with the likelihood of going out of business, appellees filed an action under the Civil Rights Laws to declare the ordinance unconstitutionally overbroad in violation of the First and Fourteenth Amendments and sought a permanent injunction against its enforcement. At the same time they applied, in vain, for the issuance of a temporary restraining order.

Thereafter, one of the three appellees, M & L Rest., Inc., faced with immediate economic ruin, resumed providing topless dancing entertainment for its patrons. Immediately a series of eight multiple, repetitive harassing criminal prosecutions were commenced by appellants against various of M & L's officers, managers and performers notwithstanding the fact that appellants were aware of the pendency of the federal action and the imminence of a determination of the constitutional issue raised therein (A-1). The remaining appellees obeyed the Ordinance attacked herein until the injunction was issued (JS-18a).

POINT I

The ordinance is unconstitutional.

The Ordinance Is Overbroad

Appellants argue in Point I that the ordinance "was directed to the prohibition of 'topless dancing' (A-13)." Whether this could have been accomplished by a narrowly drawn ordinance directed at the alleged evil sought to be

proscribed is not the issue herein.[1] What is the issue is whether the ordinance, on its face, regardless of its drafter's intention, is overbroad, i.e., "patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill* v. *State of Alabama,* 310 U.S. 88, 97-98. Cf. *Staub* v. *City of Baxley,* 455 U.S. 313"; *Smith* v. *California,* 361 U.S. 147, 151.

Appellants Deny The Basic Constitutional Principle That Legislation Inhibiting Expression Must Be Narrowly Drawn

The essence of appellant's Point I[2] is that:

> "The method exercised by the legislative body to insure the health, safety and well-being of the community, is not a proper subject for review by this Court." (Appellant's brief—Page 12).

Thus an overbroad argument is made to support this overbroad ordinance.

Appellants thereby deny that the Town of North Hempstead is a political subdivision within a constitutional democracy, asserting the right to legislate within their boundaries in derogation of the most fundamental liberties guaranteed by our Constitution. To say more on this subject would serve no purpose.

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[1] It appears undeniable that, however an offense be characterized under local law, obscenity requirements must be satisfied when the law proscribes expression by reason of its sexual orientation. *Miller* v. *California,* 413 U.S. 15; *Paris Adult Threatre* v. *Slaton,* 413 U.S. 49.

[2] See summary on Page 9 of appellants' brief and in the last sentence of the first complete paragraph on Page 12 of said brief.

Neither Legitimate Nor Compelling Governmental Interests May Be Fostered By Means Of Overbroad Speech Inhibiting Legislation

Appellants argue in Point I that the legitimate and compelling interests of the Town of North Hempstead to abate the alleged nuisances of litter, noise, patron's conduct (unspecified), congestion, and proximity to schools required the enactment of the Ordinance. They do not acknowledge that specific legislation directed against each and all of the foregoing "nuisances" has already been enacted in the laws of the State of New York, County of Nassau, and Town of North Hempstead. In a case involving the reenactment by the Town of North Hempstead of a second anti-nudity ordinance, Judge Bartels of the United States District Court of the Eastern District of New York, in his decision striking down the second ordinance, addressed himself to this nuisance argument and stated,

> "The challenged ordinance plainly covers a field much wider than is essential to further the Town's interest in dealing with the nuisance conditions complained of at the public hearing. Instead of dealing with the specific conditions, the ordinance focuses on an activity which can contain protected expression and which has not been shown to be the source of the problem. Similar problems of crowds, noise and litter are frequently presented by many forms of public entertainment such as sporting events, rock concerts, political rallies, etc., and it would be equally unreasonable to ban such events in order to correct problems which can be best attacked through regulation of zoning, parking, hours of operation, etc." *Salem Inn, Inc.* v. *Frank,* U.S.D.C., Eastern District of New York-74-C-1108, September 10, 1974.

Appellants claim that the ordinance "undercut the nuisance at the source." (Appellants' brief—Page 12). This

may be efficient yet impermissible. Appellants may not burn down the house to roast the pig. They may not outlaw prayer because of the noise and traffic congestion incident to Sabbath observance adjacent to Houses of Worship. They may not outlaw the publication of newspapers because of the noise of the presses and the congestion caused by delivery trucks. They may not outlaw political rallies because of the noise, litter, and congestion occasioned by the mass meeting. They may not outlaw shows by reason of the conditions necessarily occasioned by wide-spread public acceptance and attendance. This, however, is just what appellants claim they may do. Problems of where the public should be permitted to congregate are readily resolvable through zoning legislation. Problems of littering and noise are readily resolvable through specific penal legislation addressed to such subjects. Problems of traffic congestion are readily handled through traffic regulations. None of the foregoing problems are required or permitted to be resolved through the process which appellants refer to as an undercutting "at the source".

Overbreadth Adjudication Is Available Whenever A Law Is Susceptible Of Speech Inhibiting Application, As Is The Ordinance

Appellants note "that an overbreadth adjudication is a limited 'exception to the traditional rules of practice.' *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973)," yet they refuse to acknowledge that the ordinance, with its speech inhibiting prohibitions, was enacted within the area of just such an exception.

The complaint, Paragraph 13, alleges that the dancers who perform in plaintiff's premises are employed solely as dancers and perform no other function other than dancing on stages for the entertainment of the patrons (A-9). The moving affidavits make the same statements (A-16, 18, 20). The answer and responsive affidavits do

not dispute any of the foregoing other than by a denial of knowledge or information sufficient to form a belief (A-32). It cannot be denied that this dancing constitutes a theatrical performance or production protected by the First Amendment. *Southeastern Promotions Ltd.* v. *Conrad*, —— U.S. —— (March 18, 1975) 43 LW 4365; *Schacht* v. *U.S.*, 398 U.S. 58 (1970); *California* v. *LaRue*, 409 U.S. 109, at 118 (1972); *PBIC, Inc.* v. *Byrne*, 313 F. Supp. 757 (U.S.D.C. Mass. 1970-Three Judge Court) vacated on other grounds, 401 U.S. 987 and judgment vacated for reconsideration in light of *Miller, et al.*, 413 U.S. 905 (1973); *People* v. *Wendling*, 258 N.Y. 451.[3]

The First Amendment activity performed by the dancers upon the stages located in the appellees' premises constitutes the activity within the area which is thus conceded by appellants to be an "exception to the traditional rules of practice". *Broadrick* v. *Oklahoma, supra.* Nothwithstanding the foregoing, appellants treat the subject as if it were not within the First Amendment exception and is, therefore, not subject to overbreadth adjudication. They somehow reason that because a "municipality must deal with the most basic elements of day to day living . . . (and) must provide for garbage removal, repair of streets and roads, and the enforcement of its zoning laws . . . (and) it is critical to the municipality that such concerns be examined in relation to its day to day responsibilities and needs . . . it was proper to exclude topless dancing

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[3] This subject is more fully treated in Point III hereof. As Judge Oakes noted, in footnote 3 of the majority opinion below (A-9a):

> "While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by Judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some entertainment with his beer or shot of rye."

by prohibition of nudity in bars, cabarets . . . or any other public place . . . (and) the method exercised by the legislative body to ensure the health, safety and well-being of the community, is not a proper subject for review by this Court" (Appellants' brief Pages 11 and 12).

If the responsibility for these local government functions can somehow be translated into the power to censor, inhibit and suppress expression, where is speech immune from censorship, prior restraint and criminal sanction, and where is the fundamental exercise of First Amendment rights sacrosanct?

Appellants argue at the end of Point I that they did not bar dancing or entertainment nor did they close the doors of appellees' businesses. No, they did not do that, they merely censored in advance the performances which could be exhibited in those premises as well as in all other public places within the Town.[4]

If The Ordinance Were Not Aimed At Diminishing Or Closing Appellees' Business, It Would Have No Relation At All To Its Purported Purposes

The evils of litter, noise and congestion sought to be remedied by the ordinance are evils incident to any public assemblage. If the ordinance were not meant to put the plaintiffs out of business or to substantially reduce appellees' patronage, those evils would remain uneffected by the Ordinance. The same is true of the alleged "nuisance" of unspecified patron's conduct which has no basis whatsoever in the record on appeal. As to the alleged evil of proximity to schools where young children are in attendance, there is no evidence in the record that the exhibition in plaintiff's premises could be viewed by such children nor does the across the board prohibition allow such ex-

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[4] See the prior restraint discussion relating to *Southeastern Promotions, Ltd.* v. *Conrad* in Point III hereof.

hibitions in places which are not in close proximity to schools.[5]

Thus, it is apparent that the Ordinance in question, far from being required by any compelling governmental interest of the Town, cannot even be considered aimed at the evils which appellants claim it seeks to prohibit.[6]

Because of the organization of appellants' brief, the substantive issue of overbreath will be more fully discussed in Point III of this brief.

POINT II

The Court below properly construed the clear scope of the ordinance as proscribing nudity in all public places, by any person including performers of all types.

In Point II, appellants argue that the ordinance should be construed to be limited in scope to cabarets, bars, lounges, dance halls and discotheques and that despite the fact that (a) it specifically defines "public place," and (b) in its legislative purpose and proscriptive provisions it forbids the proscribed activity in "public places" as well as the above enumerated particular types of establishments, it was erroneously construed by the Court below

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[5] In fact, Paragraph 14 of the complaint alleges, "only adults are permitted to enter the bars" (A-9), and this allegation is not contested other than by appellants' denial of sufficient knowledge or information to form a belief (A-32 and A-34). In any event, under New York Penal Law Section 235.21, it is a crime to expose indecent material to minors, and the definition of indecent materials includes nudity which under Section 235.20 includes substantially the same definition of an uncovered female breast as is set forth in the Ordinance.

[6] To the extent that the Ordinance could destroy appellees' businesses, it could be effective by removing the source of the alleged evils. This, it indicated, could be accomplished (See App. pp. 21, 23).

to forbid the proscribed activity in places other than cabarets, bars, lounges, discotheques and dance halls.

Even assuming that the preamble was the ordinance and was the only written matter to be construed, the words themselves belie the argument. It is, however, basic statutory construction that one reads first and foremost the statute, not the preamble and legislative purpose which are read only where there is an ambiguity in the statute.[7]

Section 2 of the ordinance sets forth the definitions of the various terms used, including the words "public place". Each defined word, term, or grouping of words is given a separate subdivision. "Public place" is defined in terms so broad that it could not conceivably be limited to the bars, lounges; discotheques and dance halls which appellant argues it must be limited to.[8] The definition includes every single theatre or place, indoors or outdoors, where any theatrical production could be given in the Town of North Hempstead.

Subdivision 1 of the definitions does not take coloration from any definition of a place which precedes it since Subdivision 1 is not preceded by any of the other subdivisions.

Assuming "public place" were not mentioned and defined in the ordinance at all, places defined in Subdivision 2, 3 and 4 are sufficiently broad to clearly include any place which could be used as a theatre or for purposes of public exhibitions. Virtually all theatres and places of public

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[7] See: McKinney's Consolidated Laws of New York Annotated, Statutes 122.

[8] "Any room, place or space which is occupied or arranged to be occupied for recreational, amusement, social, sports, serving of food, or similar purposes; or any building, shed or enclosure, whether indoor or outdoor, coming within the occupancy and other similar classifications of this section. For the purposes of interpretation, the term 'public place', where used in this law shall include the term 'public assembly' or 'assembly' as may be used in other codes, laws, ordinances, rules or regulations as may be applicable in the Town of North Hempstead." (A-11 and A-12)

assembly and entertainment sell food or drink. Under the definition in 3, any theatre which has a food concession or soda machine would be subject to the proscriptions of the ordinance. By the definition of dance halls, any place in which there is an exhibition comprised in whole or part of dancing would fall within the ordinance.

In any event,

> "(O)ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[9]

It should be noted that were appellants' position relating to the construction of the words "public place" correct, and did there exist in the Town of North Hempstead places in which performances could be lawfully given by naked breasted performers, the ordinance would be subject to attack on equal protection grounds. In view of the clear meaning of the ordinance, little need be said about this point, other than to call to the Court's attention the fact that Judge Bartels, in striking down the successor ordinance which limited the scope of its proscription as herein suggested by appellants, declared the second ordinance violative of the equal protection provisions of the Fourteenth Amendment.[10]

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[9] *Schneider* v. *State*, 308 U.S. 147, 163; Quoted with approval in *Southeastern Promotions Ltd.* v. *Conrad, supra*, 4368.

[10] *Salem Inn, Inc.* v. *Frank, supra*, pp. 10-11 Sl. Op.: "Since the location classification here involves the exercise of fundamental rights protected by the First Amendment, the classification must again serve a 'compelling State interest' to withstand such an attack. *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *O'Neill* v. *Dent, supra*. While restrictions applied only to places serving alcoholic beverages have been upheld in certain circumstances involving the Twenty-First Amendment, *California* v. *LaRue, supra; Paladino* v. *City of Omaha*, 471 F. 2d 812 (Eighth Circuit 1972); *Salem* v. *Liquor Control Commission*, 298 N.E. 2d 138, 34 Ohio St. 2d 244 (1973), the ordinance here applies its restrictions to coffee shops, restaurants and even dance halls and discotheques. It is difficult to determine what compelling State interest would be served by an ordinance which would bar a production of 'Hair' at a cabaret and allow nude dancing in a burlesque theatre."

Thus, appellants' tortured construction of the clear words serves no purpose other than to subject the ordinance to additional attack under the equal protection clause of the Fourteenth Amendment.

It is respectfully suggested that Point II of appellants' brief involves no more than straw grasping.

POINT III

The ordinance on its face and as applied, is unconstitutionally overbroad in violation of the First and Fourteenth Amendments.

It is appellees' contention, upheld by both Courts below, that the ordinance is vague and overbroad in a First Amendment sense in that rather than being narrowly drawn to vindicate a compelling governmental purpose it constitutes a penal statute susceptible of sweeping and improper application, thereby threatening those who would properly exercise their rights of free speech, including appellees herein, with the expense and inconvenience of criminal prosecution.[11] As such, the ordinance is facially overbroad and violative of the First and Fourteenth Amendments. *Lewis* v. *City of New Orleans,* 415 U.S. 130 (1947); *Keyishian* v. *Board of Regents,* 385 U. S. 589, 599; *NAACP* v. *Button,* 371 U.S. 415, 432-433; *Thornhill* v. *State of Alabama,* 310 U.S. 88, 97-98; *Smith* v. *California,* 361 U.S. 147, at 151 (1959). *U. S.* v. *O'Brien, supra,* at 376; *Zwickler* v. *Koota,* 389 U. S. 241, at 250.

Futhermore, it is clear that, far from vindicating a compelling governmental interest, the ordinance serves no legitimate purpose.

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[11] Appellants, in the very first sentence of Point III of their brief, manifest an utter disregard or misunderstanding of appellees' position herein. The complaint clearly establishes that the attack upon the ordinance is not merely based upon the application of the ordinance but upon its facial invalidity as well. See: Paragraphs 19 and (1) of the complaint (A-9 and 10).

The Sweep Of The Ordinance Is Far Greater Than Necessary To Accomplish The Desired Governmental Ends

In the second sentence of their Point III, appellants contend that, "the sweep of Local Law No. 1 of 1973 is no greater than is necessary to achieve its legitimate end." They thereby concede that were the sweep of the ordinance greater than necessary to achieve the legitimate end sought thereby, the ordinance would be overbroad and unconstitutional.[12] Even if the foregoing were true, the ordinance is fatally overbroad. Appellants consistently maintain that the ordinance was directed solely against the litter, noise, congestion, proximity to schools and unspecified patrons' conduct occasioned by the existence of places within the Town of North Hempstead in which the proscribed activity takes place.

We have heretofore pointed out, as has the District Court, holding in the second *Salem Inn* case (*Salem Inn* v. *Frank, supra,* 74-C-1108) that all of the foregoing alleged evils can be readily controlled and abated by enforcement, enactment and/or amendment of the appropriate zoning and penal laws directed at each. It was neither necessary, appropriate nor constitutionally permissible to proscribe "the source of these nuisances" (Appellants' brief—Page 11) by means of an across the board prohibition effecting activity which is presumed to be expression protected by the First Amendment. It cannot be doubted that the State of New York, County of Nassau and Town of North Hempstead have sufficient laws already enacted to cope with the problems of litter, noise, or congestion adjacent to any public place. If these laws are not sufficient, additional legislation directed at the evils rather than

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[12] Appellants have here substituted "legitimate ends" for "compelling interests." Were this not an ordinance effecting dissemination of expression presumptively protected by the First Amendment, they would be correct.

the source can be enacted. This is likewise true of the unspecified "patrons' conduct" alleged to be an evil. Similarly, the Town's right to enact zoning legislation forbidding certain types of establishments to exist in certain areas or in proximity to certain types of buildings such as schools or churches, is not disputed. How then can appellants allege that the sweep of the ordinance, admittedly enacted to eliminate the source of the foregoing alleged nuisances, is no greater than necessary to achieve such ends? It could reasonably be argued that even if the ordinance were not susceptible of sweeping and improper application with respect to the suppression of First Amendment rights it would still be violative of rights under the Fourteenth Amendment to operate a lawful business in a lawful manner. See: *Terrance* v. *Thompson,* 263 U.S. 197; *New State Ice Co.* v. *Liebmann,* 285 U.S. 262; *Truax* v. *Riach,* 239 U.S. 33; *Allgeyer* v. *Louisiana,* 165 U.S. 578.

We are not, however, concerned with local regulation of ordinary economic activity. We are here concerned with an ordinance aimed at and directly resulting in the censorship and suppression of theatrical productions performed on a stage in a public place. It cannot be overemphasized that the ordinance clearly proscribes in all public places the appearance of any person with breasts or the lower part of the torso uncovered even if such appearance be part of a "scene, sketch, act or entertainment". This ordinance is not limited to exposure of private parts in a street or park. It is not even limited to outlawing topless dancing. It relates to a ballet, dance, pantomime, modern rock concert with dancing, rock group ensemble, choreographed political satire, striptease with a storyline, dramatic show, and musical comedy. The ordinance covers every conceivable place in which such a performance could be given, including a theatre, auditorium, opera hall, meeting room, bar, cabaret, discotheque or any other place open to the public. It is all-encompassing, making no distinction between topless waitresses, improperly dressed patrons, and

artistic performers. It makes no distinction between obscene and non-obscene performances. It is, indeed, the broadest across-the-board prohibition imaginable and is, therefore fatally overbroad as such term has been defined in innumerable decisions of this Court.

As was said in *NAACP* v. *Button*, 371 U.S. 415, 432-433,

> "The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a Penal Statute susceptible of sweeping an improper application."

It is the susceptibility of the sweeping and improper application of the ordinance which requires its invalidation.[13]

This overbreadth chills the exercise of First Amendment rights by deterring performers, including but not limited to dancers, from appearing bare breasted in all or a segment of their artistic performance. To require the Ballet Afrikans which performs bare breasted in their native land and in their exhibitions and performances throughout the world to don brassieres in the course of a performance in the Town of North Hempstead, as required by the ordinance, would serve no legitimate purpose other than the corruption of their performance. To require the actors and actresses in "Hair", when performing in the Town of North Hempstead, to cover their breasts and the lower part of their torsos would censor their performance and detract from its impact and artistic purpose. Examples too numerous to mention, including occasional baring of breasts in dramatic plays presently on and off Broadway, can be cited.

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[13] The ordinance is constitutionally overbroad since "It sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." *Thornhill* v. *Alabama*, 310 U.S. 88, 97.

It would be no answer to this claim of overbreadth to say that the Ordinance would not be applied to such cases but only to appellants' performers. *Keyishian* v. *Board of Regents, supra,* at 599. It is the *susceptibility* of the sweeping and improper application of the ordinance to expressive matter presumptively protected by the First Amendment which requires the Ordinance's invalidation. *Lewis* v. *City of New Orleans,* 415 U.S. 130 (1974); *Keyishian* v. *Board of Regents, supra,* at 599; *NAACP* v. *Button,* 371 U.S. 415, 432-433; *Smith* v. *California, supra,* at 151.

This is not a case such as *Broadrick* v. *Oklahoma,* 413 U.S. 601, at 618, where the Ordinance had a few possible impermissible applications. It is an across the board prohibition against the baring of breasts in any public place as part of any endeavor, artistic or otherwise. It is facially overbroad.

The Ordinance Censors Protected Expression, Not Conduct

The essence of appellants' arguments under Points I and III amount to an assertion that the prohibition of the Ordinance is allegedly "directed to conduct" (Appellants' Brief—Page 15). Since, according to appellants' Point III, conduct is allegedly proscribed by the Ordinance, appellants' Point I argues that the Town may regulate such conduct under the police power in the same way that it regulates "litter, noise, . . . congestion, . . . garbage removal, repair of streets and roads, and the enforcement of its zoning laws." (Appellants' Brief—Page 11). Appellants are in error.

It should first be noted that this case does not involve zoning regulation. Hence *Boraas* v. *Village of Belle Terre,* 416 U.S. 1 (1973), and *Euclid* v. *Ambler Realty,* 272 U.S. 365 (1926), cited by appellants do not apply. This case does not involve prohibition of the burning of Selective Service Registration Certificates or the burning or mutila-

tion of any property for that matter. Hence *United States* v. *O'Brien*, 391 U.S. 367 (1968), does not apply. This case does not involve the regulation of the service or sale of liquor by the drink or otherwise. Hence *California* v. *LaRue*, 409 U.S. 109 (1972), with its Twenty-First Amendment implications, does not apply. This case does not involve the mere prohibition of bare breasted waitresses and other employees of drinking establishments who mingle with the patrons, auction off their undergarments, touch and are touched by the patrons, and perform no artistic exhibition. Hence, virtually every State case cited on Page 16 of appellants' brief does not apply.

What this case concerns is an ordinance which sets forth an across the board prohibition upon any breast exposure in any public place, including but not limited to censorship and prior restraint of the content and exhibition of theatrical performances. Since a theatrical production, like a motion picture, is protected by the First Amendment, *Southeastern Promotions* v. *Conrad, supra; Schacht* v. *United States, supra; California* v. *LaRue, supra,* it would seem obvious from a point of view of First Amendment analysis that a dance exhibition in public on a stage is undistinguishable from any other type of theatrical production. Can a distinction be drawn between dance routines based upon the locality of the stage on which each is performed? Can a distinction be drawn between dance routines based upon whether they are part of a Broadway musical, a rock concert, a ballet, or a one person recital? Can a distinction be drawn between a modern dance recital, a dramatic play, a lavish musical, a go-go dance exhibition, a belly dance exhibition, or any other type of theatrical production performed on a stage? If no such distinctions may be drawn among each of the various classes of theatri-

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[14] In this case, unlike *Brandon Shores, Inc.* v. *Greenwood Lake*, 68 Misc. 2d 343, 32 N.Y.S. 2d 957, the First Amendment issue has been raised. Thus *Brandon Shores* certainly does not apply.

cal productions heretofore referred to, are they not all presumptively protected by the First Amendment and protected from overbroad legislative interference with their content. See footnote 3 of majority opinion below (App. pp. 8a, 9a).

Recently, this Court has had occasion to review the issue of First Amendment protection of theatrical performances and local government attempts to restrain them.

In *Southeastern Promotions Ltd.* v. *Conrad, supra,* a municipality refused to permit the use of its public assembly facility for exhibition of a show which provided nude performances. This refusal was held by both the District Court and the Circuit Court to involve a constitutionally permissible limitation upon conduct, not speech. In the words of this Court, at 4367,

> "The District Court . . . concluded that group nudity and simulated sex would violate city ordinances and state statutes making public nudity and obscene acts criminal offenses. This criminal conduct, the Court reasoned, was neither speech nor symbolic speech, and was to be viewed separately from the musical's speech elements. Being pure conduct, comparable to rape or murder, it was not entitled to First Amendment protection . . . on appeal, the United States Court of Appeals for the Sixth Circuit, by a divided vote, affirmed . . . the majority relied primarily on the lower court's reasoning. Neither the Judges of the Court of Appeals nor the District Court saw the musical performed."

This Court, in March of 1975 reversed, holding at Page 4367:

> "We hold that respondents' rejection of petitioner's application to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimum procedural safeguards."

The basis for this holding was the following reasoning (p. 4369):

> "Only if we were to conclude that live drama was unprotected by the First Amendment—or subject to a totally different standard than that applied to other forms of expression—could we possibly find no prior restraint here. Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems (citations omitted). By its nature, theatre usually is the acting out or singing out of the written word, and freqeuntly mixes speech with live action or conduct. But that is no reason to hold theatre subject to a drastically different standard."

By so reasoning and holding, this Court recognized that a theatrical performance is an inseparable entity, a union of words, action, music, emotion, or any combination of the foregoing. "The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature." *Southeastern Promotions Ltd.* v. *Atlanta,* 334 F. Supp. 634, 639 (N.D. Ga. 1971).[15] This is equally true of each type of theatrical performance, every one of which is subject to the nudity ban of the Ordinance herein.

As Mr. Justice Blackmun noted in *Southeastern Promotions* v. *Conrad, supra,* each art form presents its own unique set of First and Fourteenth Amendment problems. Each must be judged for what it is, not by standards applicable to another medium of expression. There is no aspect of speech (with the possible exception of the written word)

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[15] It is not, therefore, "separately identifiable conduct which allegedly was intended by (petitioner) to be perceived by others as expressive of particular views but which on its face, does not necessarily convey any message." *Cohen* v. *California,* 403 U.S. 15, 18.

which does not involve an integrally related action that is part and parcel of that speech.[16] Thus in *Kleindienst* v. *Mandel*, 408 U.S. 753, 764, the speech-conduct argument was expressly rejected by this Court which stated:

> "We cannot realistically say that the problem facing us disappears entirely or is non-existent because the mode or regulation bears directly on physical movement."

The integrated activities protected by the First Amendment, too numerous to tabulate, including writing, publishing, dancing, singing, acting, picketing, leafleting, demonstrating, broadcasting, etc., are all speech, and are curtailable in whole or in part only by narrowly drawn restrictive legislation designed and necessary to vindicate compelling governmental interests. *U.S.* v. *O'Brien*, 391 U.S. 367, 376. Moreover, when such restrictive regulation involves sexual content, it must satisfy obscenity criteria. *Miller* v. *California*, 413 U.S. 15, 25-6.[17]

If, as this Court has recently held in *Southeastern Promotions Ltd.* v. *Conrad, supra*, theatrical performances including bare breasted females are just as much presumptively protected by the First Amendment as motion-pictures and cannot therefore be subjected to prior restraints, can the content of such theatrical productions be restricted by an across the board prohibition against the baring of a breast? Is there any doubt that the Town of North Hempstead would have no power to forbid the exposure of a naked breast in a motion picture in any public place within

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[16] See *Tinker* v. *Des Moines School District*, 393 U.S. 503; *Organization For a Better Austin* v. *Keefe*, 402 U.S. 415, 419; *Spence* v. *Washington*, 417 U.S. ——; *Southeastern Promotions Ltd.* v. *Conrad, supra.*

[17] Obscenity is not in issue herein. Further, appellants do not allege that appellee's theatrical presentations are obscene.

the Township? How then can appellants argue that this is permissible in the case of theatrical productions? If the Town of North Hempstead cannot summarily deny a license for the exhibition of the show "Hair" in its municipal auditorium, how can it proscribe its exhibition in any public place in the Town.

Appellants formulate their speech conduct dichotomy as follows: "because topless dancing is conduct with little, if any, expressive elements," it is not afforded absolute First Amendment protection "and the Town may properly exclude this form of 'entertainment' " under its police power. (Appellants' Brief—Pages 16 and 17). Firstly, it cannot be overemphasized that the ordinance is directed at bare bosoms "in any scene, sketch, act or entertainment" (Section III of ordinance—App. p. 5). It is not limited to topless dancing. It is not limited to "conduct with little, if any, expressive element." (Appellants' Brief—Page 16). It covers any bare bosom in any theatrical performance, whether that theatrical performance be a dramatic presentation of the biblical story of Adam and Eve, the musicals "Hair" or "Calcutta", the musical revue of the Follies Bergere, or the Ballet Africans.

Secondly, as was noted heretofore and in *Southeastern Promotions Ltd.* v. *Conrad, supra,* a theatrical production, like a motion picture, is not conduct within the meaning of *Broadrick* and *O'Brien,* but protected expression.[18] In neither of the foregoing cases was there any theatrical production or artistic endeavor. Even in those cases however, it was clearly held that *only a compelling governmental*

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[18] *Sheldon* v. *Metro-Goldwyn,* 81 F. 2d 49 (2d Cir.—Judge Learned Hand): "Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves . . . a nod, a movement of the hand, a pause may tell the audience more than words could tell . . . the play is the sequence of the confluents of all these means bound together in an inseparable unity . . ."

interest in regulating the nonspeech element can justify incidental limitations on the protected expression.

Thirdly, in *O'Brien* it was clearly held that the governmental interest to be protected must be unrelated to the suppression of free expression and the incidental restriction on the First Amendment freedom must be no greater than is essential to the furtherance of that interest. *U. S.* v. *O'Brien,* 391 U.S. 367, at 376-377 (1968). Thus even if this were a case of mixed conduct and speech (which it is not), this blunderbuss ordinance cannot be justified on any grounds other than speech inhibition, and if founded on the grounds set forth in appellants' papers, is far greater in sweep than essential to the furtherance of the legitimate governmental interest sought to be achieved thereby.

Fourthly, the ordinance regulates a speech element of a theatrical performance, rather than a non-speech element, since the nudity is an integral element of the artistic performance, the totality of which is inseparable protected speech (unless obscene).

At the end of Point III, appellants question the right of appellees to assert the overbreadth of the ordinance where it is abundantly clear that their activities could or would fall within the proscription of a more narrowly drawn law.[19] Appellants further contend that the ordinance is subject to a limiting construction or partial invalidation which may remove the applicability of the overbreadth rules. These positions are wholly untenable and fly in the face of all First Amendment precedents.

Initially, it should be noted that when local laws which limit First Amendment freedoms are challenged in a Federal Court on grounds of overbreadth, they must be judged on their face. *Aptheker* v. *Secretary of State,* 378 U.S. 500; *Zwickler* v. *Koota,* 389 U.S. 241. It is not the function

[19] This argument might be more aptly addressed to standing.

of the Federal Court to predict or foresee a limiting construction of the words of the ordinance. Secondly, the Federal Court cannot dissect the overbroad ordinance, invalidating some and saving the rest. As was said in *Smith* v. *California, supra*, at 151:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution."

Thirdly, the fact that appellees are aware that the ordinances are directed at them does not eliminate the constitutional deficiency of vagueness and overbreadth in the First Amendment sense. As was said in *NAACP* v. *Button*, 371 U.S. 415, at 432-433,

> "The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice to a criminally accused . . . but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a Penal Statute susceptible of sweeping and improper application."

Thus, a person may know that he is or may be caught within the net of an overbroad speech inhibiting statute and thereby be chilled in the exercise of his First Amendment rights.[20]

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[20] Appellants' contention that the chill results from lack of notice of the scope of regulation is wholly incorrect. The reference by appellants to *Younger* v. *Harris* is more properly covered under Point IV on the issue of abstention. At this time, however, it should be noted that *Younger* did not hold as appellants contend, that the plaintiffs' activity must be shown to be protected activity without any possibility of regulation by a narrowly drawn law.

Fourthly, appellees herein have every right to assert the overbreadth of the Ordinance herein even if it be conceded, which it is not, that their activities could be properly proscribed by a narrowly drawn ordinance. In *Tollett* v. *United States,* 485 F. 2d 1087 1088-9 (1973), the United States Court of Appeals for the Eighth Circuit treated these issues, reviewing the precedents of this Court in some detail. It concluded as follows:

> "It is now settled that a person has standing to attack a statute as overly broad if a reasonable construction of the act allows suppression of free speech notwithstanding that the person's own conduct might not be constitutionally protected. This rule is recognized because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a Penal Statute susceptible of sweeping and improper application.' *Dombrowski* v. *Pfister,* 380 U.S. 479, 487, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22 (1965), quoting *NAACP* v. *Button,* 371, U.S. 415, 433, 83 S. Ct. 328, 9L. Ed. 2d 405 (1963). Without proper restriction such a law 'would tend to suppress constitutionally protected rights.'' Note, the First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 873 (1970). To allow standing under such circumstances 'is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.' *Gooding* v. *Wilson,* 405 U.S. 518, 521, 92 S. Ct. 1103, 1105, 31 L. Ed. 2d 408 (1972). Since this is a departure from traditional rules of standing the doctrine requires that the overbreadth of a statute 'must not only be real, but substantial as well.' *Broadrick* v. *Oklahoma,* —— U.S. —— 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)."

Virtually all of the arguments of appellants at the end of Point III were disposed of by this Court in *Gooding* v. *Wilson*, 405 U.S. 518, at 520, 521 (1972), when this Court held:

> "Only the Georgia Courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe State legislation.' *United States* v. *37 Photographs*, 402 U.S. 363, 369, 28 L. Ed. 822, 830, 91 S. Ct. 1400 (1971). It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' *Dombrowski* v. *Pfister*, 380 U.S. 479, 491, 14 L. Ed. 2d 22, 31, 85 S. Ct. 1116 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity,' (Citations omitted). This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.
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> 'Although a statute may be neither vague, overbroad, or otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting con-

struction is placed on the statute. The statute, in effect is striken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights.' *Coates* v. *City of Cincinnati, supra,* at 619-620, 29 L. Ed. 2d 221 (opinion of White, J.' (Citation ommitted)."

It cannot be doubted that the ordinance is overbroad, is speech inhibiting, is directed against a class of which appellees are members, and is subject to attack on this basis by appellees as violative of their First and Fourteenth Amendment rights.

POINT IV

Abstention is inappropriate where as in the instant case appellees commenced this federal action at a time when no prosecution whatsoever was pending against them under the ordinance in the State Courts.

Abstention Is Not Appropriate And *Younger* Is Not Applicable

Appellants' Point IV urges upon this Court a novel doctrine of *post facto* jurisdictional divestiture and seeks as well the reconsideration and reconstruction by this Court of the line of cases commencing with *Dombrowski* v. *Pfister, supra,* and running through *Zwickler* v. *Koota,* 389 U.S. 241; *Younger* v. *Harris,* 401 U. S. 37 and *Steffel* v. *Thompson,* 415 U.S. 452 (1974).

It is well established and the Court below held, that where an action challenges local law as being violative of the First Amendment on its face, a Federal Court must decide the issues on the merits and not abstain. *Zwickler* v. *Koota, supra,* at 248-252 (1967); *Dombrowski* v. *Pfister, supra,* at 483-485 (1964); *Steffel* v. *Thompson, supra.* The rejection of abstention in such cases results from the

paramount importance of removing the inevitable chilling effect on First Amendment rights that such a statute invariably establishes. As this Court has frequently stated, relegating a plaintiff to a State Court to vindicate First Amendment rights after a Federal action has been commenced would not only be unwise but would constitute an abrogation by Federal Courts of their prime responsibility to uphold constitutional liberties. Thus in *Zwickler* at Page 252, the Court held:

> ". . . Congress imposed the duty upon all levels of the Federal Judiciary to give due respect to a suitor's choice of a Federal forum for the hearing and decision of its Federal constitutional claims. Plainly, escape from that duty is not permissible merely because State Courts also have the solemn responsibility, equally with the Federal Courts ' . . . to guard, enforce and protect every right granted or secured by the Constitution of the United States . . .' *Robb* v. *Connoly*, 111 U.S. 624. We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."
> "These principles have particular significance when, as in this case, the attack upon the statute upon its face is for repugnancy to the First Amendment. In such a case to force the plaintiff who has commenced a Federal action to suffer the delay of State Court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect."

While it is true that the *Younger* Sextet did, as appellants claim, examine the propriety of anticipatory federal relief against state criminal proceedings, it has never been suggested that those cases required or even suggested that Federal Courts abstain from adjudicating First Amend-

ment challenges against overbroad laws except where the Federal plaintiff was at the time of the filing of the federal complaint a subject of State Court enforcement of the law which was being attacked in the Federal complaint. Thus, in *Younger* v. *Harris, supra,* at Page 41, the Court held:

> "We express no view about the circumstances under which Federal Courts may act when there is no prosecution pending in State Courts at the time the federal proceeding is *begun.*" (emphasis supplied)[21]

In *Steffel* v. *Thompson, supra,* this Court clearly held at page 475 that:

> "Regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal *plaintiff demonstrates a genuine threat of enforcement* of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." (emphasis supplied)

In view of the foregoing, it would appear that appellants are confusing abstention doctrines with the very particular and special situations presented by the *Younger* sextet involving factual situations where State Court proceedings had been commenced prior to the invocation of Federal court jurisdiction.

It would be difficult to improve upon the decision of the Circuit Court below on these issues.

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[21] In his dissent below, Judge Lumbard misconstrues *Younger* v. *Harris* as requiring abstention in the absence of "special circumstances" when there "is only a threat of state prosecution." App. p. 10a). This construction would deny a federal forum to those chilled by an overbroad law unless they were harassed or subjected to bad faith law enforcement. This is so since Federal standing in civil rights cases requires the threat of enforcement and enforcement requires abstention.

On the subject of state-federal comity, it should be noted that appellants were aware of the filing of the federal complaint and the imminent federal adjudication of the constitutional issue with respect to the Ordinance. If they were so concerned with federal-state friction as they appear to indicate in their brief, they could well have refrained from commencing the criminal prosecution for a few weeks pending the determination of the Federal Court. It was the activities of appellants which precipitated federal-state abrasion, if any, which may have been occasioned in the instant case. Appellants seek to have this Court relegate appellees to a waiting period of years for the adjudication of the constitutional issue while the state case wends its way through the multi-tiered state criminal process, yet, appellants could not wait the few weeks that the Federal Court would take in adjudicating the issue.[22] It is not the Federal Court's assumption of its rightful duties and jurisdiction, but rather appellants' failure to stay their own hands, that precipitated whatever friction that was created in the instant case. It could have readily been avoided by the mere recognition by appellants of the substantial constitutional question raised by the federal complaint and a little patience which would allow the one appellee who resumed the proscribed activity to continue doing so for a few weeks more without prosecution. Can appellants explain what damage would have been done had they allowed an activity which had been carried on in the Town for many prior years to continue for a few weeks more?

While *Younger* is *not* applicable, since the federal action preceded any state court process, the following should also be noted. *Younger* was not decided for the purpose of enabling a local government to initiate a series of multiple

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[22] In the words of Mr. Justice Brennan, appellants argument herein is indeed intended to "turn Federalism on its head." *Steffel* v. *Thompson*, *supra*, at 472.

harassing prosecutions which would drive a person out of business prior to the date of the adjudication of the constitutionality of the law under which such prosecutions were commenced. It is submitted that had the multiple harassing prosecutions (8 prosecutions in a period of a few days) been initiated prior to the date of the commencement of the federal action, this would have constituted the "special circumstances" of *Younger*, militating against abstention. These eight criminal prosecutions commenced in machine gun fashion against employees of the one appellee who felt compelled to resume the proscribed activity after the commencement of the federal action, did not expose that appellee to an injury "incidental to every criminal proceeding brought lawfully and in good faith." *Younger* v. *Harris*, *supra*, at 49.[23]

It is not comity that appellants seek to sustain in this case, but rather the right of this municipality to drive appellees out of business prior to the vindication of their First and Fourteenth Amendment rights. This case manifests nothing but blatant disregard for the First Amendment.[24]

On the issue which appellants refer to as the "Alphonse-Gaston routine," it must be clear to all that this is a misnomer. There has been no reluctance on the part of the local government to assume and even usurp jurisdiction. In any event, while it may not be particularly appealing to have the Court which determines constitutional rights selected by so arbitrary a means as "first come-first

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[23] In *Younger* at 49, the Court held,

"There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected."

[24] The subsequent enactment of a second ordinance comparable to the Ordinance herein and the attempt to enforce said ordinance in the face of the decisions in this case prior to the adjudication by this Court is further evidence of that disregard for the First Amendment.

served", in a constitutional federal system, wherein both systems of Courts are charged with the protection of the same constitutional rights, is there a more desirable alternative? At least with such a rule, the locus of decision making power is readily determinable. Appellants have suggested no better formula unless its proposed doctrine of *post facto* jurisdictional divestiture is accepted by this Court, in which case the Federal Courts will have essentially abrogated their responsibility of adjudicating constitutional rights threatened by overbroad speech inhibiting local laws.

Abstention would serve no purpose in this case. Only where a limiting validating construction could be placed upon the statute by the State Courts in a single case would there be *any* valid rationale for abstention. *Dombrowski* v. *Pfister, supra,* 491, *Gooding* v. *Wilson, supra,* 520-1.[25]

The Ordinance must be uncertain in nature, and "obviously susceptible of a limiting construction" in order to warrant abstention. *Zwickler* v. *Koota, supra,* at 251, note 14.

The overbreadth of the instant statute is such that it would take innumerable cases and a like number of years to limit the statute to a point where the substantive issue of constitutionality would pose a credible problem. In fact, far from being *obviously susceptible of a limiting construction,* it is unlikely that any construction could save this overbroad speech inhibiting statute. The only purpose for abstention in the instant case would be to permit the state

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[25] Judge Oakes responded to the limiting construction issue as follows in footnote 6 of the opinion below (App. p. 10a): "In other words, we are asked to abstain on the sheer speculation that state Courts might interpret Local Law No. 1—1973 contrary to its explicit language, thereby removing the constitutional question. Such speculation does not satisfy the 'special circumstances' required to make abstention proper. See: *Zwickler* v. *Koota,* 389 U.S. 241, 249-52, 254 (1967); *Baggett* v. *Bullitt,* 377 U.S. 360, 375-78 (1964)."

to put appellants out of business through the suppression of their First and Fourteenth Amendment rights prior to the expiration of the many years that it would take to adjudicate the issues raised herein through the multi-tiered state criminal process.[26] This is not what *Younger* meant to accomplish.

Abstention is neither required nor appropriate and federal anticipatory relief was plainly warranted.

There Was Irreparable Injury In The Traditional Equity Sense

Since *Younger* is not applicable, and since appellees demonstrated traditional equity irreparable injury, appellees were entitled to injunctive relief.

As to the irreparable injury which would warrant injunctive relief, the Courts below found no problem, after hearings, in determining that appellees were faced with virtual insolvency as a result of their compliance with the ordinance. The affidavits on the motion for a preliminary injunction clearly indicate that appellees' customers, accustomed to the entertainment proscribed by the ordinance, merely shifted their business from appellees' premises, leaving appellees with daily losses in operations. This was confirmed in hearings conducted by the Court. It is not even controverted by appellants. What greater irreparable injury can there be to the exercisors of First Amendment rights than to drive them out of business by means of legislation censoring and suppressing such rights?

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[26] It cannot be doubted that "where First Amendment rights are involved—questions relating to the structure and timing of (judicial) remedies have been thought crucial to substantive constitutional policies." Hart & Wechsler, *The Federal Court and* the Federal System, (2ed.) 367; See also Monaghan, *First Amendment, "Due Process"*, 83 Harv. L. Rev. 518, 524-26. It is upon this basis that anticipatory relief in cases involving potentially speech inhibiting laws is founded.

Judge Oakes, in his majority opinion below, summarized the finding of irreparable injury succinctly, as follows:

> "In short, if the ordinance here with its $500 per day fine were enforced against these appellees, they would be required to continue in business without presenting their form of entertainment (thereby involving a potential deprivation of their and the public's first amendment rights).
>
> In that case, they allege, they would also sustain a 'substantial loss of business and threatened bankruptcy.' Their option—violating the law to exercise their claimed rights and awaiting prosecution in the New York courts—involves its own loss of economic and personal rights. Here as in *414 Theater Corp.* v. *Murphy, supra,* there is sufficient irreparable injury indicated to justify at least the temporary injunction. We are left then with the question of the applicability of the *Younger* sextet to the preliminary injunction sought here. With respect to appellees Tim-Rob Bar and Salem Inn the *Younger* question is in exactly the same posture as encountered by this court in the recent decision, *414 Theater Corp.* v. *Murphy, supra.* In *414 Theater* we affirmed the preliminary injunction, in short because the underlying rationale behind *Younger* did not apply when state prosecutions were not pending when the Federal actions were brought. Id. at 3573-76. See *Steffel* v. *Thompson,* 42 U.S.L.W. 4357, 4360 (U.S. Mar. 20, 1974); *Lake Carriers' Association* v. *MacMullan,* 406 U.S. 498, 509 (1972). Similarly, we find *Younger* inapplicable to Tim-Rob Bar and Salem Inn here, and accordingly affirm the preliminary injunction as to them"

It cannot be overemphasized that where First Amendment rights are involved the irreparable injury stems not

only from the economic loss resulting from the enforcement of the ordinance, but also from the violation of the First Amendment rights both of the exhibitors and their patrons. See: *Procunier* v. *Martinez*, 416 U.S. ——, 42 U.S.L.W. 4606, 4610 (U.S. Apr. 29, 1974).

Even Assuming *Younger* Applicable, This Case Comes Within The Exceptions (Special Circumstances)

Even had the multiple harassing prosecutions (8 prosecutions in a period of a few days) been initiated prior to the date of the commencement of the federal action, *Younger* would not have required abstention. These eight criminal prosecutions commenced in machine gun fashion against employees of the one appellee who felt compelled to resume the proscribed activity after the commencement of the federal action, did not expose that appellee to an injury "incidental to every criminal proceeding brought lawfully and in good faith." *Younger* v. *Harris, supra,* at 49. In *Younger* at 49, the Court held,

> "There is no suggestion that this single prosecution against Harris is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected."

Thus it is clear that *Younger* was not a license to suppress First Amendment activity under an unconstitutional ordinance through a series of repetitive harassing criminal prosecutions aimed at suppressing the expressive activity carried on at the premises. Under the Younger circumstances, that of the pendency of a single state criminal prosecution prior to the invocation of federal jurisdiction, abstention was appropriate. Where, however, as in the instant case, there was no single prosecution, but rather eight prosecutions commenced within a period of days, it cannot be said that *Younger* requires or even warrants abstention. It is not possible to vindicate First Amendment

rights even in the State Courts where there is rapid fire repeated multiple prosecutions. When that factor is considered along with the fact that there is no limiting construction even if *Younger* were applicable (which it is not) this case comes within the exceptions.

The final issue raised herein is whether assuming abstention is inappropriate with regard to the two appellees who were never involved in state proceedings,[37] should appellee M & L be treated differently. The clear advantages of conservation of judicial energy, speedy determination and avoidance of conflicting substantive determinations favors equal treatment for M & L. Are there any significant interests militating against such equal treatment? Would the desire to avoid the alleged state-federal abrasion underlying the doctrine of comity be served by abstaining with respect to one federal plaintiff and not as to the other two? The answer is obvious. Since significant interests call for equal treatment of all three appellees herein and no interests militate against such equal treament, abstention as to M & L is uncalled for in this case.[38]

Thus, abstention is inappropriate herein with regard to any of appellees as to both declaratory and injunctive relief.

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[37] The dissent below (App. pp. 13a, 14a) would require the two appellees not involved in any state prosecution to await the adjudication of their claim herein by the State Courts in the M & L employees' prosecutions. This would place the two appellees in a position of never having an opportunity to be heard. It must be assumed that the dissent below would come to the same conclution had the state commenced a criminal prosecution under the Ordinance against a non party to the instant action at any time prior to federal adjudication.

[38] This is so even if it might be warranted under some theory of *post facto* jurisdictional divestiture, were M & L the only appellee.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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